Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute codes CNC

Introduction

This hearing was convened to deal with an application by the tenants under the *Residential Tenancy Act* (the "Act") seeking an order cancelling a 1 Month Notice to End Tenancy for Cause dated March 31, 2017 (the "1 Month Notice").

The three named tenant applicants and the landlord attended the hearing. Both parties had full opportunity to be heard, to present affirmed testimony, to make submissions and to present documentary evidence.

Service of the tenants' application and notice of hearing was not at issue.

Issue(s) to be Decided

Are the tenants entitled to an order cancelling the 1 Month Notice?

Background and Evidence

According to the tenancy agreement submitted by the tenants and the parties' affirmed evidence, this tenancy began in April, 2012 with one of the current tenants, JW, and two other co-tenants. Rent is currently $1,594.95 monthly, payable on the first of the month. A security deposit of $750.00 was paid at the beginning of the tenancy and remains in the landlord's possession.

The 1 Month Notice indicates that the tenants have "assigned or sublet the rental unit without landlord's written consent." In the "details" section the landlord has written: "Second offense of tenant living in rental suite without landlord's permission. *Breach provides ground for termination of tenancy as outlined in section two of lease."

It was agreed that as other tenants have left, they have been replaced. "Lease Amending Agreement #4" was submitted by the tenants. It is dated January 21, 2015

and adds a new co-tenant, AC, to the tenancy. It is signed by the landlord, JW, and AC. It is also signed by a third co-tenant, TM, who appears to have been added at an earlier date.

It was also agreed that the current dispute has arisen as a result of the replacement of AC by TG.

The landlord testified that JW has historically replaced her co-tenants, and that the addition of TG is the fifth such replacement.

The tenants in response stated that the landlord has allowed them to replace their co-tenants. JW testified that when one of her co-tenants wishes to vacate, she advises the landlord, locates a replacement, and then puts the replacement forward to the landlord, who says yes or no, although the landlord has never rejected a replacement tenant. The landlord and all of the tenants, including the prospective tenant, then meet and amend the tenancy agreement in writing. This usually, if not always, occurs before the new tenant has moved in.

The tenants also stated that they have never before received notice that the replacement of tenants is a problem. They say that although the landlord alleges in the 1 Month Notice that that this is the "second offence of tenant living in rental suite without landlord's permission" that this is in fact their first notice that the landlord has any concerns.

The landlord also testified that she has not historically insisted that she approve replacement tenants. Instead, JW has been allowed to simply put replacement tenants forward, who are then added to the tenancy agreement.

The tenants submitted email correspondence between themselves and the landlord. In one of the emails, dated August 21, 2016, the landlord states: "Hi All, It looks like I will be over on the Sept 3,4 weekend but details are still being worked out. I look forward to meeting [TG] and adding her to the lease." The tenants testified that TG moved in on or about September 1, 2016. In an email dated October 24, 2016, the landlord writes to JW, TM, and TG: "Hi All, I will available to come by and discuss the above concerns and update the lease with the new addition next weekend. Let's pick a time that works. . . " Another email in evidence, dated March 10, 2017, and to all three of the tenants, shows the landlord stating that she will be in town on March 31, 2017 and asking for the three tenants to arrange a time to renew the lease.

The tenants testified that when they met with the landlord on March 31, 2017, they understood that they were meeting to sign the amendment adding TG to the tenancy agreement, but instead the landlord served them with the 1 Month Notice.

The landlord stated that the tenants had not submitted all of the email correspondence and that in some of the missing correspondence the tenants had been demanding and disrespectful. The landlord also stated that the tenants had missed opportunities to sign the amendment.

Analysis

Section 47(1)(i) of the Act allows a landlord to end a tenancy for cause where a tenant has purported to assign or sublet the rental unit without the landlord's written consent. Unless the tenant agrees that the tenancy will end, the tenant must dispute a notice under this section by filing an application within 10 days of receipt. In this case, the tenants received the 1 Month Notice on March 31, 2017 and applied to dispute it April 6, 2017. The tenants are therefore within the time limit.

Once a tenant disputes a notice, the burden of proof is on the landlord on a balance of probabilities to establish the cause alleged. Here, the landlord has not established that the tenants have either assigned or sublet the rental unit or that the landlord has not consented to the addition of the third tenant.

Residential Tenancy Branch Policy Guideline #19 offers some guidance on the meaning of assignment and subletting: "Assignment is the act of permanently transferring a tenant's rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord." In this case there is no permanent transfer of JW's tenancy.

Subletting occurs when the agreement between the landlord and the original tenant remains in place, and a new agreement (a sublease) is entered between the original tenant and the new tenant (the subtenant), so that the original tenant becomes the subtenant's landlord. In this case, the parties have historically added tenants to the original agreement, so that the original landlord remains the only landlord.

As set out above, the landlord has included the following in the "details" section of the 1 Month Notice: "Second offense of tenant living in rental suite without landlord's permission. *Breach provides ground for termination of tenancy as outlined in section two of lease." The landlord appears to be alleging that the tenants have breached a material term of the agreement, and that she has cause under s. 47(h) of the Act.

Under section 2 of the original tenancy agreement, submitted by the tenants, the tenants agree that the tenants named in the agreement "shall be the only permanent occupants during the term of this agreement, unless the Landlord agrees [illegible – in writing to?] other persons becoming occupants. The Tenant acknowledges and agrees that this covenant is a materials covenant in the Residential Tenancy Agreement and that its breach will provide grounds for termination."

However, I cannot accept that this is a "material term" of the agreement. Residential Tenancy Branch Policy Guideline # 8 confirms that a term is not material simply because it is characterized as such. Under that guideline, a "material term" is one that both parties agree is so important that its breach immediately authorizes the other party to end the agreement. Here, TG has been residing in the rental unit since September of 2016. If this "breach" were actually material the landlord would have acted before March 31, 2017.

Breach of a material term under the Act also requires that the landlord give the tenants written notice of the breach and a reasonable opportunity to correct it before terminating the tenancy. In the case before me, the landlord has not given the tenants any such notice. Instead, she has on several occasions explicitly authorized TG's occupancy and deliberately allowed all three tenants to believe that adding TG to the writing agreement was only a formality. I find that the landlord has failed to provide notice of any alleged breach. I further find that the landlord has already authorized TG's tenancy.

The landlord has not established on a balance of probabilities that there is cause to end the tenancy under s. 47(i) or s. 47(h) of the Act. Accordingly, I cancel the landlord's 1 Month Notice.

Conclusion

The tenants' application to cancel the 1 Month Notice is allowed. The landlord's 1 Month Notice is cancelled. The tenancy will continue until ended in accordance with the Act.

As the tenants' application is successful, I grant the tenants the cost of the filing fee in the amount of $100.00 pursuant to s. 72 of the Act and authorize them to withhold $100.00 from their monthly rent on a one time basis in full satisfaction of the filing fee.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the Act. Pursuant to s. 77 of the Act, a decision or an order is final and binding, except as otherwise provided in the Act.

Dated: May 16, 2017

Residential Tenancy Branch